

1 SPILLANE SHAEFFER
2 ARONOFF BANDLOW LLP
3 Lincoln D. Bandlow (SBN 170449)
4 1880 Century Park East, Suite 1004
5 Los Angeles, CA 90067-2627
6 Telephone: (310) 229-9300
7 Fax: (310) 229-9380
8 lbandlow@ssablaw.com

9 Attorneys for Defendant
10 JOHN MCCAIN

11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

13 JACKSON BROWNE., an individual

14 Plaintiff,

15 vs.

16 JOHN MCCAIN, an individual; THE
17 REPUBLICAN NATIONAL
18 COMMITTEE, a non-profit political
19 organization; THE OHIO REPUBLICAN
20 PARTY, a non-profit political
21 organization,

22 Defendants.

CASE # CV08-05334 RGK (Ex)

**DEFENDANTS' JOINT *EX*
PARTE APPLICATION TO
EXTEND TIME FOR ALL
DEFENDANTS TO RESPOND
TO COMPLAINT;
MEMORANDUM OF
POINTS AND AUTHORITIES**

Hon. R. Gary Klausner

Date Filed: August 14, 2008

1 Pursuant to Local Rules 7-19 and 8-3, Defendants John McCain (“McCain”),
2 the Republican National Committee (“RNC”) and the Ohio Republican Party (“ORP”)
3 (collectively “Defendants”) hereby jointly apply *ex parte* for an order extending the
4 date by which the Defendants must file a response to the Complaint until November
5 17, 2008.

6
7 In preparing this application, Defendants have reviewed the Court’s Scheduling
8 and Case Management Order regarding *ex parte* applications, the governing Local
9 Rules, as well as *Mission Power Engineering Co. v. Continental Casualty Co.*, 883 F.
10 Supp. 488 (C.D. Cal. 1995), and respectfully submits that *ex parte* relief is warranted
11 for the following reasons:

12
13 1. The current deadline by which the Defendants must respond to the
14 Complaint is October 27, 2008;

15
16 2. This deadline is a result of the Stipulation to Extend Time to Respond to
17 the Complaint filed on September 15, 2008 and the agreement by counsel for plaintiff
18 Jackson Browne (“Browne”) that Defendants deadline to respond would be October
19 27, 2008;

20
21 3. *Ex parte* relief is necessary because if the Defendants are required to
22 proceed with a regularly noticed motion to extend the time by which to respond to the
23 complaint, the motion will not come up for hearing prior to the current deadline for
24 responding to the Complaint; and;

25
26 4. Given that the national, state and local elections will be held on
27 November 4, 2008, the Defendants would all be severely prejudiced if they are
28 required to deviate their focus from the elections to provide fact intensive declarations

1 necessary to comply with the current responsive pleading deadline of October 27,
2 2008.

3
4 Browne is represented by Lawrence Y. Iser and Jonathan P. Steinsapir, Kinsella
5 Weitzman Iser Kump & Aldisert LLP, 808 Wilshire Blvd., 3rd Floor, Santa Monica,
6 California 90401, (310) 566-9800, (310) 566-9850 (fax), liser@kwikalaw.com and
7 jsteinsapir@kwikalaw.com. On October 6, 2008, counsel for the parties held a
8 telephonic conference during which they conducted their meet and confer pursuant to
9 the Local Rules on the motions Defendants intended to file in response to the
10 Complaint, including a Motion to Dismiss Pursuant to Federal Rule of Civil Procedure
11 12(b)(6), an Anti-SLAPP Motion pursuant to California Code of Civil Procedure sec.
12 425.16 (by McCain, the ORP and the RNC) , and a Motion to Dismiss Pursuant to
13 Federal Rule of Civil Procedure 12(b)(2) & (3) for lack of personal jurisdiction and
14 improper venue or, in the alternative, to Transfer Venue pursuant to 28 U.S.C. §
15 1404(a) (by the ORP). In addition to discussing these proposed motions, the parties'
16 counsel discussed the possibility of agreeing to a short stay of the case to allow the
17 parties to conduct an early mediation. Counsel for Browne indicated that, by October
18 10, 2008, they would respond to Defendants' contentions regarding the proposed
19 motions and the proposal to stay the case to conduct an early mediation.

20
21 In the afternoon of October 10, 2008, Browne's counsel indicated in a letter sent
22 to Defendants' counsel that Browne declined the proposal to conduct an early
23 mediation and that the Defendants should proceed with their various motions. On
24 October 13, 2008, counsel for McCain, on behalf of all Defendants, spoke to Browne's
25 counsel and requested that Browne agree to an extension of time for all Defendants to
26 respond to the Complaint until November 17, 2008, in light of the fact that the various
27 motions required extensive fact gathering and declarations by individuals who
28 currently have limited availability to assist in gathering this information and

1 reviewing/signing declarations in light of the pending November 4, 2008 Presidential
2 election. Browne's counsel contacted counsel for McCain later that day and informed
3 him that Browne had declined to allow this requested extension of time to respond to
4 the Complaint. In that same October 13, 2008 conversation, counsel for McCain
5 informed counsel for Browne that Defendants would make an *ex parte* application to
6 extend the time to respond to the Complaint. Counsel for Browne indicated that
7 Browne would oppose the application.
8

9 DATED: October 14, 2008

Spillane Shaeffer Aronoff Bandlow LLP

10
11 By: 

Lincoln D. Bandlow

12
13 Attorneys for Defendant
JOHN MCCAIN
14

15 DATED: October 14, 2008

GRUNSKY, EBEY, FARRAR & HOWELL

16
17
18 By: 

Rebecca Connolly

19
20 Attorneys for Defendant
THE OHIO REPUBLICAN PARTY
21

22 DATED: October 14, 2008

KLEIN, O'NEILL & SINGH, LLP

23
24
25 By: 

Howard J. Klein

26
27 Attorneys for Defendant
THE REPUBLICAN NATIONAL
COMMITTEE
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendants respectfully request that the Court grant a short extension of time to
4 respond to the Complaint in this matter. The reason for this request is simple:
5 Defendants are in the last three weeks of hard-fought political campaign that will
6 determine the identity of the next President of the United States, the members of the
7 111th United States Congress, and hundreds of state and local office-holders. The
8 relevant witnesses to this case are currently working almost around-the-clock to elect
9 their preferred candidates. Defendants merely ask that they be able to complete this
10 (almost-completed) campaign before turning their attention to litigating this case. As
11 the alleged infringing acts ceased occurring more than two months ago, there is no
12 urgency, and, if this Motion is granted, the litigation will proceed as any normal case
13 would, in late November.

14 **II. ARGUMENT**

15 In this action, the plaintiff, singer Jackson Browne (“Browne”), alleges that the
16 Ohio Republican Party (“ORP”), the Republican National Committee (“RNC”) and
17 Senator and Republican Presidential candidate John McCain (“McCain”) created a
18 political video (the “Video”) in connection with an August 2008 campaign visit to
19 Ohio that was being made by Democratic Presidential candidate Barack Obama
20 (“Obama”). The Video refers to Obama and McCain’s respective energy policies, and
21 Obama is shown stating that significant energy savings can be attained by people
22 simply keeping their automobile tires properly inflated. During this Video and while
23 referencing Obama’s statement, less than thirty (30) seconds of the song *Running On*
24 *Empty* (the “Song”) is played in the background, with the obvious message being that,
25 when it comes to having an energy policy, the Obama campaign is “running on
26 empty.” The Video ran on the YouTube website for two or three days at most in
27 August, has since been removed, and will not be run again. (The Video was designed
28 to comment on Obama’s August campaign appearance in Ohio, and therefore the

1 Video is no longer topical. Defendants have agreed to cease, and have ceased, all use
2 of the Video. Indeed, Browne's counsel was informed of such on August 7, 2008.)

3 On August 14, 2008, Browne, the alleged copyright owner in the Song, filed this
4 action, asserting claims for Copyright Infringement, false endorsement under the
5 Lanham Act and violation of his California common law right of publicity. Counsel
6 for the Defendants agreed to accept service of the Complaint around the end of
7 September and, through stipulation and agreement by counsel for Browne,
8 Defendants' initial date to respond to the Complaint was extended to October 27,
9 2008.

10 On October 6, 2008, counsel for the parties held a telephonic conference during
11 which they conducted their meet and confer pursuant to the Local Rules on the
12 motions Defendants intended to file in response to the Complaint. In particular,
13 counsel for McCain and the RNC discussed their intention to file a motion to dismiss
14 the Lanham Act and Copyright Infringement claims pursuant to Federal Rule of Civil
15 Procedure 12(b)(6) and an anti-SLAPP motion to strike Browne's common law right
16 of publicity claim pursuant to California Code of Civil Procedure § 425.16. While
17 counsel for the ORP contemplates joining in these substantive motions, counsel for the
18 ORP also discussed its intention to file a motion to dismiss pursuant to Federal Rule of
19 Civil Procedure 12(b)(2) & (3) for lack of personal jurisdiction and improper venue or,
20 in the alternative, to transfer venue to Ohio pursuant to 28 U.S.C. § 1404(a). In
21 addition to discussing these proposed motions, the parties' counsel discussed the
22 possibility of agreeing to a short stay of the case to allow the parties to conduct an
23 early mediation in an effort to resolve the case before extensive time and expense is
24 invested in motion practice. Counsel for Browne indicated that, by October 10, 2008,
25 he would respond to Defendants' contentions regarding the proposed motions and
26 Defendants' proposal to stay the case to conduct an early mediation.

27 In the afternoon of October 10, 2008, Browne's counsel indicated in a letter sent
28 to Defendants' counsel that Browne declined the proposal to conduct an early

1 mediation and that the Defendants should proceed with their various motions. On
2 October 13, 2008, counsel for McCain, on behalf of all Defendants, spoke to Browne's
3 counsel and requested that Browne agree to an extension of time for all Defendants to
4 respond to the Complaint until November 17, 2008, in light of the fact that the various
5 motions required extensive fact gathering and declarations by individuals who
6 currently have restricted availability to assist in gathering this information and
7 reviewing/signing declarations in light of the pending November 4, 2008 election.
8 Browne's counsel contacted counsel for McCain later that day and informed him that
9 Browne had declined to allow this requested extension of time to respond to the
10 Complaint.

11 Defendants respectfully and jointly apply *ex parte* for an Order from the Court
12 extending the deadline by which Defendants must respond to the Complaint until
13 November 17, 2008. As the Court can well imagine, the various Defendants have
14 been, and will continue to be, extensively involved in matters pertaining to the general
15 election that will take place on November 4, 2008, including McCain's campaign for
16 the President of the United States as well as many Congressional, state, and local
17 campaigns. The intense campaign activity of the final three weeks of the campaign
18 will substantially impair Defendants' ability to provide the necessary information and
19 assistance to their respective counsel required for the various detailed and, particularly
20 regarding the anti-SLAPP and jurisdictional motions, fact-intensive responsive
21 pleadings and declarations. These motions require an extensive fact-gathering process,
22 as well as declarations from the parties and others, all of whom are very involved in
23 the political and communications aspects of the Presidential and other campaigns.

24 Given their extensive involvement and intensity of the demands of the campaign
25 trail in the last few weeks before the election, the Defendants, representatives of the
26 entity Defendants, and other witnesses necessary for the drafting and filing of these
27 responsive pleadings, have extremely limited availability to provide consultation and
28 assistance in gathering information and preparing declarations relevant to the motions

1 until after the general election on November 4, 2008. Thus, Defendants would be
2 prejudiced if they are not granted a short period of time after the election (when the
3 relevant individuals can focus on gathering the necessary information) to prepare and
4 file responsive pleadings.

5 In contrast to this prejudice to Defendants if an extension is not granted, no
6 prejudice at all would be suffered by Browne by entering a brief three-week extension
7 of time for Defendants to respond. As noted above, the Video was removed from
8 YouTube only two days after it was posted there, and Defendants have agreed to cease
9 any further use or distribution of the Video (or of the Song). Thus, there is no potential
10 for continuing harm, and the only issues remaining in the case are whether liability can
11 be demonstrated and, if so, the extent of damages, if any. There is no possibility of
12 harm to Browne from postponing the first round of motions to resolve those issues for
13 a mere three weeks.

14 When Browne's counsel informed Defendants that Browne had denied
15 Defendants' request for an extension to respond in light of the pressing time
16 constraints imposed by the pending election, and when Browne's counsel stated that
17 Browne would oppose this *ex parte* application, the only reason stated for such a
18 denial and opposition was that prior extensions had been granted. Browne did not (and
19 indeed cannot) dispute that the pending election was a significant impediment to
20 Defendants' ability to obtain the information necessary to prepare the responsive
21 pleadings, nor did Browne indicate (because, of course, he cannot) that he would
22 suffer any prejudice from the short three week continuance.

23 ///

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25 ///

1 **III. CONCLUSION**

2 Of course, Defendants recognize the need to avoid significant delay of this
3 matter and to begin working toward resolution as soon as is practicable for all parties.
4 Accordingly, Defendants seek only a short, three (3) week delay in the deadline to
5 respond to the Complaint in order to allow Defendants to properly prepare their
6 respective responses.

7
8 Respectfully Submitted,

9
10 DATED: October 14, 2008

Spillane Shaeffer Aronoff Bandlow LLP

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12 By: 

Lincoln D. Bandlow

13
14 Attorneys for Defendant
JOHN MCCAIN

15
16 DATED: October 14, 2008

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